



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 15, 2003

Ms. Carol Longoria
Office of the General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2003-3285

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181096.

The University of Texas System (the "system") received a request for three categories of information pertaining to the "Short Term and Long Term Disability Program" as follows:

1. decision matrix, summary or proposal scoring analysis that led to the "final decision";
2. the successful bidder's response to the Request for Proposal and supporting documentation; and
3. the successful bidder's rate quote.

Although the system does not take a position with regard to the release of the requested information, the system claims that portions of the requested bid proposal may be subject to third party confidentiality claims. You state that all other responsive information not at issue will be released to the requestor. Pursuant to section 552.305(d) of the Government Code, the system notified an interested third party, CNA Group Benefits ("CNA"), of the system's receipt of the request and of CNA's right to submit arguments to this office as to why information relating to CNA should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory

predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act (the "Act") in certain circumstances). We have considered CNA's arguments and have reviewed the submitted information.¹

Initially, we note that although you state that CNA has indicated and marked a section of its bid proposal as confidential, information is not considered to be confidential under the Act simply because the party submitting it to the governmental body anticipates or requests that it be kept confidential. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. See Attorney General Opinion JM-672 (1987); see also Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). Consequently, unless this marked information is encompassed by applicable exceptions to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

Next, we address the arguments presented by CNA with respect to the submitted information. CNA argues that the requested information constitutes CNA's trade secret information and commercial or financial information the release of which would cause CNA substantial competitive harm pursuant to section 552.110 of the Government Code. We note that the Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

¹ You state that after discussing the scope of this request for information with CNA, the company wishes to withhold from release the section of its proposal marked "Interrogatories." We note that the only responsive information that you have submitted to us for our review consists of these "Interrogatories." Accordingly, the scope of any claimed exceptions to disclosure is limited to this particular information.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a person's trade secret claim under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990).

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

Based on our review of CNA's arguments and the submitted information, we find that CNA has sufficiently demonstrated that portions of the information constitute commercial and financial information the release of which would cause CNA substantial competitive harm. Accordingly, we conclude that the system must withhold the information that we have marked pursuant to section 552.110(b) of the Government Code. However, we also find that CNA has failed to present us with a *prima facie* case that any portion of the remaining submitted information constitutes CNA's trade secret information or commercial or financial information the release of which would cause CNA substantial competitive harm. *See* Open Records Decision Nos. 319 (1982) (finding information relating to organization, personnel,

² The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110), 184 (1978). Accordingly, we also conclude that the system may not withhold any portion of the remaining submitted information under section 552.110 of the Government Code.

CNA also claims that the requested information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with constitutional law.³ In this regard, CNA merely states that the release of the requested information would constitute a “deprivation of property without due process of law and an unconstitutional taking.” We note that for information to be encompassed by section 552.101, the provision argued must explicitly require confidentiality for the information. A confidentiality requirement will not be inferred from statutory or constitutional structure. *See, e.g.,* Open Records Decision No. 465 at 4-5 (1987). After reviewing CNA’s statement and the remaining submitted information, we find that CNA has not adequately demonstrated that any portion of this information is expressly made confidential. Accordingly, we conclude that the system may not withhold any portion of the remaining submitted information pursuant to section 552.101 of the Government Code in conjunction with constitutional law.

However, we note that e-mail addresses that are contained within the remaining submitted information may be excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 provides in relevant part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov’t Code § 552.137. Section 552.137 requires the system to withhold e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the system, unless the members of the public with whom they are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee’s work e-mail address or a business’s general e-mail address or web address. Accordingly, we conclude that the system must withhold the e-mail addresses that we have marked pursuant to section 552.137 of the Government Code, unless the members of the public with whom they are associated have affirmatively consented to their release.

³ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov’t Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by constitutional law.

In summary, the system must the information that we have marked pursuant to section 552.110(b) of the Government Code. The system must withhold the e-mail addresses that we have marked pursuant to section 552.137 of the Government Code, unless the members of the public with whom they are associated have affirmatively consented to their release. The system must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 181096

Enc. Marked documents

c: Mr. Phillip A. Kennedy
Account Executive
Metropolitan Life Insurance Company
One City Boulevard West, Suite 700
Orange, California 92868
(w/o enclosures)

Mr. Joseph Sadowy
CNA Group Benefits
600 N. Pearl St., Ste. 1750
Dallas, Texas 75201
(w/o enclosures)

Mr. Mark Pryor
Vinson & Elkins, L.L.P.
3700 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201-2975
(w/o enclosures)